

Current Copyright Law & Policy Activities of the Copyright Office



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The Copyright Office Comes to California
March 7, 2007
San Jose, California

Congressional Study

Congressional Study

- Satellite Home Viewer Extension and Reauthorization Act of 2004 requires the Office to conduct a study to examine and compare the statutory licensing systems for the cable and satellite television industries under 17 U.S.C. §§ 111, 119 and 122.

Congressional Study

The Act requires the Office to consider five specific areas of interest:

1. Consideration of the royalties paid by licensees under each section, looking to compare the rates paid by cable systems with those paid by the satellite carriers and to compare these rates to those paid in the marketplace for similar services.

Congressional Study

2. An analysis of the differences in the terms and conditions of the licenses, again focusing on the advantages and disadvantages that flow from these terms, and an analysis of whether the terms of each license is justified by historical, technological or regulatory differences.
3. An analysis of whether the licenses are still justified on the basis upon which they were founded.

Congressional Study

4. An analysis of the correlation between the fees charged for carriage of the signals and the rates subscribers pay for the service, nothing whether any savings to the industry flow through to the subscribers.
5. An analysis of issues that may arise with respect to the application of the licenses to the retransmission of digital signals.

Congressional Study

- Expect to publish Notice of Inquiry in March, requesting comments on the issues under study and perhaps announcing dates for hearings on the issues.
- Report due to Congress on June 30, 2008.

Rulemakings

Current rulemakings

- On September 20, 2006, Office published a NOI to clarify applicability of existing rules to the retransmission of digital broadcast signals under Section 111. 71 Fed. Reg. 54948.
- **Three key issues:**
 1. Copyright liability for carriage of both analog and digital signals,
 2. Effect of multicasting in assessing royalty payments, and
 3. Inclusion of receipts for set-top boxes used to receive digital signals into gross receipts.

Additional rulemakings

Three additional proceedings related to the cable compulsory license:

1. To address proposed changes to the SOAs, including information related to gross receipts, service tiers, headend locations & cable communities. See 71 Fed. Reg. 45749 (August 10, 2006).
2. Proceeding to consider creation of subscriber groups as a way to address the phantom signal problem.
3. Proceeding to set guidelines for purposes of determining whether a particular station fits the definition of a network station for purposes of section 111.

Novel Questions of Law

-  [Rate and Distribution Proceedings](#)
-  [Federal Register Notices](#)
-  [Royalty Claims](#)
-  [Governing Laws](#)
-  [Background Information and Website Use](#)
-  [Relevant Links](#)
-  [Contact Us](#)

Current Developments

- The trial in Digital Performance Right 'in Sound Recordings and Ephemeral Recordings (webcasting rates and terms) began on May 1, 2006. ([read more](#))



Appointment of [Copyright Royalty Judges](#)

Taking the oath of their new office from Librarian James H. Billington on Jan. 11 are Copyright Royalty Board judges, from left, Stanley Wisniewski, James S. Sledge, and William J. Roberts.

Federal Register Notices

Procedural Regulations for the Copyright Royalty Board: Final rule with request for comments

71 FR 53325 September 11, 2006

Version: [PDF](#), [Text](#)

Referral by the Copyright Royalty Judges

- Request by the Recording Industry Association of America to refer to the Register the question of whether a “mastertone” was subject to a Section 115 license.
- Within the context of CRJ’s proceeding to set rates for mechanical and digital phonorecord deliveries under statutory license, 17 U.S.C. § 115.

17 U.S.C. §802(f)(1)(B)

(B) Novel questions.--(i) In any case in which a novel material question of substantive law concerning an interpretation of those provisions of this title that are the subject of the proceeding is presented, the Copyright Royalty Judges shall request a decision of the Register of Copyrights, in writing, to resolve such novel question. Reasonable provision shall be made for comment on such request by the participants in the proceeding, in such a way as to minimize duplication and delay. The Register of Copyrights shall transmit his or her decision to the Copyright Royalty Judges within 30 days after the Register of Copyrights receives all of the briefs or comments of the participants. ...

17 U.S.C. §802(f)(1)(B)

- ...Such decision shall be in writing and included by the Copyright Royalty Judges in the record that accompanies their final determination. If such a decision is timely delivered to the Copyright Royalty Judges, the Copyright Royalty Judges shall apply the legal determinations embodied in the decision of the Register of Copyrights in resolving material questions of substantive law.
- (ii) In clause (i), a `novel question of law' is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

REFERRAL OF A NOVEL QUESTION OF LAW

The Recording Industry Association of America, Inc. (“RIAA”) requests the Copyright Royalty Board (“Board”) to refer a question to the Register of Copyrights (“Register”) regarding the eligibility of a “masterone” – a short digital sound recording file distributed for use in a cellular telephone or similar device – for statutory licensing under 17 U.S.C. §115. RIAA Motion Requesting Referral of a Novel Material Question of Substantive Law, at 1 (August 1, 2006). An opposition to the RIAA motion was submitted, collectively, by the National Music Publishers’ Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International.

After considering the arguments of the parties, the Board agrees that the matters raised by the RIAA motion do present two novel questions of law that require referral to the Register. Consequently, as required by 17 U.S.C. 802(f)(1)(B), the Board is requesting a decision of the Register as to the following:

Does a ringtone, made available for use on a cellular telephone or similar device, constitute delivery of a digital phonorecord that is subject to statutory licensing under 17 U.S.C. 115, irrespective of whether the ringtone is monophonic (having only a single melodic line), polyphonic (having both melody and harmony) or a mastertone (a digital sound recording or excerpt thereof)? If so, what are the legal conditions and/or limitations on such statutory licensing?

Ringtones

- Are ringtones covered by the §115 compulsory license?

...



17 U.S.C. §115(a)(1)

When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to *make and distribute phonorecords* of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for *private use*, including by means of a digital phonorecord delivery. ...


17 U.S.C. §115(d)

A “digital phonorecord delivery” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. ...


17 U.S.C. §115(d)

... A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

Ringtones

- Are ringtones covered by the §115 compulsory  license?
 - Are ringtones digital phonorecord deliveries?
 - Is Section 115 applicable to *portions* of works?
 - Is it relevant that ringtones are being licensed in the marketplace?
- Public vs. private use
 - Is a ringtone meant for public or private use?

Ringtones

- Are Ringtones
Derivative Works?
 - Are all ringtones the same?
 - Additional lyrics
 - Pussycat Dolls “Don’t Cha”: Come on boy, don’t cha wanna pick up? We’re ready for ya. 
 - If a ringtone is a derivative work, does that disqualify it from the §115 compulsory license
- Arrangement privilege

17 U.S.C. §115(a)(2)

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

Ringtones

- Arrangement privilege in §115
 - Does it cover excerpts from a work?
 - Does it cover additional lyrics?

Destiny's Child's "Let Me Cater 2 You":
"What's up, this is Beyonce from Destiny's
child and this call is for you."



- Do ringtones change the basic melody and fundamental character of the musical work?

Ringtones

- Do ringtones change the melody and fundamental character of the work?
 - What is the fundamental character of the work? Does it depend upon the use of the work?

Ringtones

- First use
 - Once a publisher allows one person to distribute ringtones of a musical work, may any other person then obtain a compulsory license with respect to that ringtone?

Ringtones - Summary

- Ringtones (including monophonic and polyphonic ringtones and mastertones) qualify as digital phonorecord deliveries.
- Whether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof) or a derivative work.

Appeal of determination

- Two weeks after the determination was issued, NMPA filed a petition with the United States Court of Appeals challenging the decision that certain ringtones come within the scope of Section 115 license.
- Requested review on the grounds that ruling exceeded jurisdiction and authority, is contrary to constitutional right, violates applicable statutes, and is arbitrary and capricious.

Appeal of determination

- Section 803(d) allows an aggrieved party to appeal the final determination of the Copyright Royalty Judges within 30 days after publication of the final determination in the Federal Register.
- Petition not yet ripe for consideration. NMPA has filed motion to hold proceeding in abeyance whereas government has filed motion to dismiss.

ORDER
GRANTING IN PART AND DENYING IN PART SOUNDEXCHANGE'S
MOTION REQUESTING REFERRAL OF
NOVEL MATERIAL QUESTIONS OF SUBSTANTIVE LAW

SoundExchange, Inc. ("SoundExchange") requests the Copyright Royalty Board ("Board") to refer two questions to the Register of Copyrights ("Register") regarding: (1) whether the Sirius-EchoStar service is a "preexisting subscription service" under 17 U.S.C. § 114(j)(11) and (2) whether the XM-DirecTV service is a "new subscription service" under 17 U.S.C. § 114(f)(2). SoundExchange Motion Requesting Referral Of Novel Material Questions Of Substantive Law at 1 (January 1, 2006). Sirius Satellite Radio Inc. responded to the SoundExchange motion without objection, while XM Satellite Radio Inc. opposed the Sound Exchange motion with respect to the second question.

After considering the arguments of the parties, the Board agrees that one issue raised by the SoundExchange motion, insofar as it concerns which entities are preexisting subscription services under 17 U.S.C. § 114(j)(11), does present a novel material question of substantive law that requires referral to the Register. The same question also is implicated by SoundExchange's motion for referral in 2006-1 CRB DSTRA (May 4, 2006). Consequently, as required by 17 U.S.C. § 802(f)(1)(B), the Board is requesting a decision of the Register as to the following question:

Is the universe of preexisting subscription services – defined in 17 U.S.C. § 114(j)(11) as services which perform sound recordings by means of noninteractive audio-only subscription digital audio transmissions and which were in existence and making such transmissions to the public for a fee on or before July 31, 1998 -- limited by law to only Muzak (provided over the DISH Network), Music Choice, and DMX?¹

Preexisting Services -

§114(j)(11)

A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, ***which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998,*** and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

Preexisting service

- DMX: Change in ownership – asset sale under section 363 of Bankruptcy code.
- Is the DMX service – under new ownership – a preexisting service?
- Similarly, is Sirius which replaced Muzak as the service offering music over DiSHNetwork in 2004, a preexisting service?
- Or are “preexisting services” confined to business entities that operated such services on or before July 31, 1998.

Preexisting service

- Why does it matter?
- Rates for preexisting services are governed by 17 U.S.C. § 801(b)(1):
 - Rates “shall be calculated to achieve the following objectives:
 - (A) To **maximize the availability** of creative works to the public;
 - (B) To afford the **copyright owner a fair return** for his creative work and the copyright user a fair income under existing economic conditions;
 - (C) To **reflect the relative roles of the copyright owner and the copyright user** in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
 - (D) To **minimize any disruptive impact** on the structure

Preexisting service

- Rates for new services are governed by 17 U.S.C. § 114(e)(4):
 - “rates that most clearly represent the fees that would have been negotiated ***in the marketplace between a willing buyer and a willing seller***. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including —
 - (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
 - (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.”

Preexisting Services

- Determination: For purposes of participating in a rate setting proceeding, a “preexisting service” is the business entity which operates under the statutory license and was in operation as of July 31, 1998.
- Whether entity known as DMX is a successor in interest to the entity that was in operation as of July 31, 1998, was a question of fact for the CRJs.

Anticircumvention Rulemaking

§ 1201(a)(1)(A) Circumvention of copyright protection systems:

- No person shall circumvent a technological measure that effectively controls access to a work protected under this title....

Anticircumvention Rulemaking

§1201 (a)(1)(B)

The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

Anticircumvention Rulemaking

§1201(a)(1)(C):

During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works.

Anticircumvention Rulemaking

In conducting such rulemaking, the Librarian shall examine -

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

§1201(a)(1) Rulemaking

The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

§1201(a)(1)(D)

Anticircumvention Rulemaking

- Notice of Inquiry, October 3, 2005
- 74 initial comments received December 1st
- 35 reply comments received February 2nd
- 4 days of hearings:
 - in Palo Alto, CA on March 23
 - in Washington, DC on March 29, 31, and April 3
 - 18 witnesses
- Post-hearing Questions to Witnesses

Legal Issues

Resolved in past rulemakings:

- What is a “particular class of works”?
- Can a “class of works” be defined by reference to the status of the user (e.g., an academic researcher), or by reference to the type of use (e.g., fair use)?
- *Conclusion: A “class” of works must be based on attributes of the works themselves, and not by reference to external criteria such as the intended use or users of the works*
- Section 102 categories of works, or some subsets of those categories, must be the starting point in determining what a “class” is.
 - Such a classification would begin by reference to attributes of the works themselves, but could then be narrowed by reference to the medium on which the works are distributed, or even to the access control measure applied to them. (2000 Decision)
- What must the proponents of an exemption prove?
 - Burden is on proponent to prove that the prohibition on circumvention has had or is likely to have a substantial adverse effect on noninfringing use of the particular class of works
 - “Distinct, verifiable and measurable impacts” (Commerce Committee Report)
 - “Mere inconveniences, or individual cases, do not rise to the level of substantial adverse impact” (Judiciary Committee Section-by-Section analysis)

Exempted Classes

Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

“Class of Work”

- Legislative history (House Commerce Comm.):
 - “assess users' ability to make lawful uses of works ‘within each particular class of copyrighted works specified in the rulemaking.’ The Committee intends that the “particular class of copyrighted works” be a narrow and focused subset of the broad categories of works of authorship than [sic] is identified in section 102 of the Copyright Act.”

Exempted Classes

Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Exempted Classes

Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

Exempted Classes

Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

Exempted Classes

Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

CTIA & TracFone Submissions

- Feb. 2: Deadline for reply comments:
- March 10: Deadline to request to participate in public hearings
- March 23: Hearing on “Computer programs that operate wireless telecommunications handsets. (Mobile firmware)”
- Aug. 14: Letter to Witnesses
- Sept. 11, CTIA – The Wireless Association & TracFone Submissions
- Sept. 18: Letter to CTIA
- Sept. 22: Letter from CTIA

NTIA Letters

- Oct. 31, 2006 Letter from John M. R. Kneuer, Asst. Sec'y of Commerce for Communications and Information:
 - CTIA and TracFone comments “afford you a complete record in which the views of both users and creators of content are currently represented.”
 - Urged the Register to consider those submissions in making her recommendation.

Exempted Classes

Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

Rejected Classes

Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or a computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.

Rejected Classes

- Space-shifting.
- DVDs that cannot be viewed on Linux operating systems.
- Region Coded DVDs.
- Computer programs protected by mechanisms that restrict their full operation to a particular platform or operating system.
- Computer games and software with Copy Protections that prevent legitimate users installing and using games and programs

Rejected Classes

- Literary works distributed in electronic audio format by libraries.
- All works and fair use works.
- All works protected by access controls that prevent the creation of back-up copies.
- Audiovisual works and sound recordings protected by a broadcast flag.
- Miscellaneous.

Anticircumvention Rulemaking

<http://www.copyright.gov/1201/>

110TH CONGRESS
1ST SESSION

H. R. 1201

To amend title 17, United States Code, to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2007

Mr. BOUCHER (for himself, Mr. DOOLITTLE, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Freedom and Innova-
5 tion Revitalizing U.S. Entrepreneurship Act of 2007”.

Litigation

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 06-cv-22942-GRAHAM

TRACFONE WIRELESS, INC.,

Plaintiff,

vs.

JAMES H. BILLINGTON, Librarian of
Congress, and

MARYBETH PETERS, Register of
Copyrights,

Defendants

Kahle v. Gonzales

474 F.3d 665 (9th Cir., January 22, 2007)

Plaintiffs sought declaration:

- (1) that Copyright Renewal Act of 1992 (Copyright Renewal Act) and the Copyright Term Extension Act (CTEA) are unconstitutional by virtue of the First Amendment;
- (2) that the Copyright Renewal Act and the CTEA have violated the “limited Times” prescription of Article I, sec. 8, cl. 8, by establishing terms that are so long as to be effectively perpetual;
- (3) that the Copyright Act of 1976, the Berne Convention Implementation Act (BCIA), and the Copyright Renewal Act are unconstitutional for failing to “promote ... Progress;”
- (4) that the Copyright Renewal Act and CTEA are unconstitutional to the extent they extend the terms of copyrights that have not, and will not, be renewed.

Kahle v. Gonzales

474 F.3d 665 (9th Cir., January 22, 2007)

9th Circuit held:

(1) renewal requirements of Copyright Renewal Act (CRA) and Copyright Term Extension Act (CTEA) did not trigger First Amendment scrutiny, and
(2) renewal requirements did not violate constitutional requirement that copyrights endure only for “limited times.”

Luck's Music Lib. v. Gonzales

407 F.3d 1262 (D.C. Cir. 2005)

United States v. Martignon

346 F.Supp.2d 413 (S.D.N.Y., Sept. 24, 2004)

Appeal pending

Kiss Catalog, Ltd. v. Passport International Productions, Inc.

350 F.Supp.2d 823 (C.D. Cal., Dec. 21, 2004),
reconsidered, 405 F.Supp.2d 1169 (C.D. Cal.
Dec. 21, 2005)

New York Mercantile Exchange v. Intercontinental Exchange

--- F.Supp.2d ----, 2005 WL 2402871
(S.D.N.Y., Sept. 29, 2005)

Golan v. Gonzales

2005 WL 914754, 74 U.S.P.Q.2d 1808

(D. Colo., April 20, 2005)

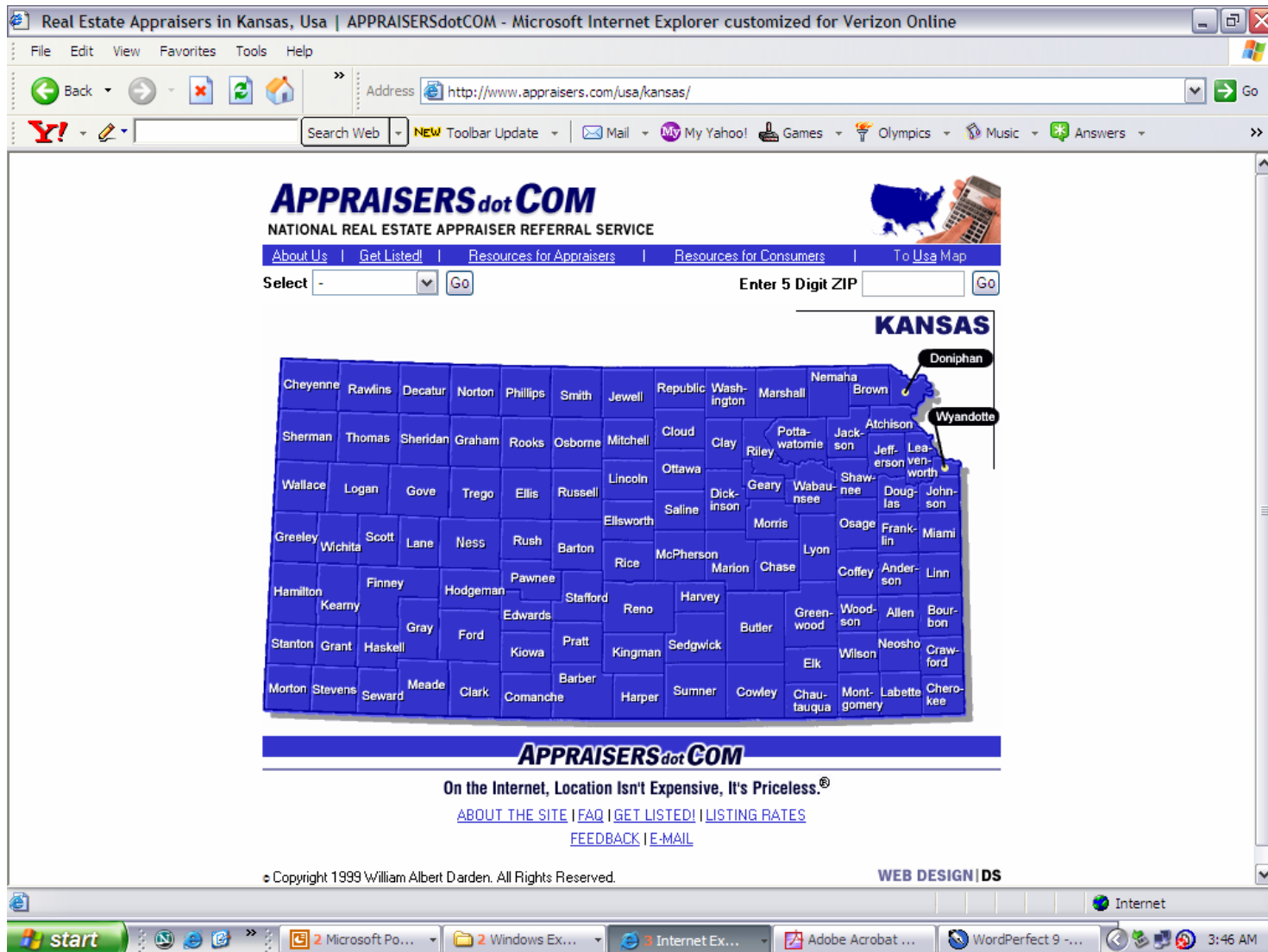
Appeal pending

Darden v. Peters

402 F.Supp.2d 638 (E.D.N.C. Dec. 6, 2005)



Darden v. Peters



Darden v. Peters

- The scope of a court's review under the APA's "arbitrary and capricious" standard is narrow.
 - whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.
- Rejection was a "carefully reasoned decision that was within the Register's discretion."

Darden v. Peters

- Maps:
 - Copyright Office determined that the changes to the census maps noted by Plaintiff -- such as layout, format, size, spacing and coloring--were not registerable.
 - E.g., use of postal abbreviations to identify the 50 states
 - E.g., use of shading to add minor visual effects.
 - The individual state maps are shaded in blue, while the county names are written in white.
 - Copyright Office has determined that shading, coloring or fonts, are not by themselves sufficient to make a work original.

Darden v. Peters

- Website: Compilation authorship?
 - Plaintiff's request for registration was far too broad since it included a claim for uncopyrightable Maps, unoriginal formatting elements, and an uncreative layout of those elements.

Darden v. Peters

- Darden appealed decision to the United States Court of Appeals for the Fourth Circuit, challenging:
 - The application of the Abuse of Discretion Standard of Review.
 - The Register's refusal to register the maps and the website pages.

